SITI ESAH TALIB

v.

MENTIGA CORPORATION BHD

HIGH COURT MALAYA, KUANTAN
VT SINGHAM J
[COMPANIES (WINDING UP) PETITION NO: 28-5-2008]
25 FEBRUARY 2010

CIVIL PROCEDURE: *Striking out - Winding up petition - Winding up proceedings constituting abuse of court's process - Petitioner refusing to accept payment by company without bona fide reasons - Petition filed for a collateral purpose - Attempt to use petition to recover debts owing to supporting creditors - Petitioner improperly filing petition without first attempting to obtain payment by other means - Petition struck out*

COMPANY LAW: *Winding up - Opposition to winding-up - Whether debt may be settled by company after filing of petition but before winding-up order granted - Whether petition filed for collateral purpose of benefiting third parties - Petition struck out*

COMPANY LAW: *Winding up - Petition - Striking out - Application to strike out petition - Whether winding up proceedings constituted abuse of court's process - Company prepared to settle petitioner's debts - Whether petitioner's refusal to accept payment was not bona fide - Petition filed for a collateral purpose to recover debts to supporting creditors - Petitioner improperly filing petition without first attempting to obtain payment by other means - Petition struck out*

EVIDENCE: *Relevancy - Conduct - Evidence of subsequent conduct - Whether conduct of petitioner subsequent to filing of winding up petition a relevant fact as to whether petition was filed for collateral purpose - Evidence Act 1950, s. 8*

The petitioner filed a petition to wind up the respondent company on 28 April 2008 (encl. 2). This petition was filed by the petitioner as a judgment creditor pursuant to a judgment dated 10 January 2007, which together with interest and cost amounted to RM51,204.03. A Notice of Intention to Appear on Petition with the list of 61 creditors was tendered in court in support of the petition by M/s Siva Ram & Kong, solicitors for the said supporting creditors who were also the solicitors for the petitioner. Another

A Notice of Intention to Appear on Petition with the list of 101 creditors was tendered in court by M/s Mura Raju & Co in support of the petition wherein Mura Raju was also acting as counsel for the petitioner. By letter dated 22 April 2009, the respondent's solicitors sent a cheque for the sum of RM50,786.34 to the B petitioner's solicitors in settlement of the judgment sum. The petitioner's solicitors however returned the said cheque on the ground that the amount was insufficient to pay all the creditors. Subsequently, the solicitors for the petitioner also claimed that accepting such payment from the respondent would amount to C undue preference to the prejudice of the other 61 supporting creditors. The petitioner's solicitors also wrote to the respondent's solicitors requesting payment from the respondent to settle the two sets of creditors amounting to a total sum of RM8,639,327.12 million. The respondent then filed this Notice of Motion praying D that the winding up petition be struck out on the grounds that the petition was frivolous and was an abuse of the process since the respondent had the ability to pay the sum stated in the winding up petition.

E **Held (allowing the notice of motion and striking out the winding up petition with costs):**

(1) There is no impediment to settle the judgment sum or debt even after the time stipulated in the statutory notice to the respondent had passed or even after the petition is filed in court F as this will depend on the facts and circumstances of the particular case and is on a case to case basis. (para 8)

(2) The grounds stated by the petitioner's solicitors for refusing to accept the payment cast doubt on the *bona fides* of the G petitioner since the petition which was filed ought to have been for the sole purpose of recovering the judgment sum obtained by the petitioner and not to collect the alleged debts of the supporting creditors. (para 8)

H **(3)** The petitioner had the option whether or not to accept the payment in settlement of the debt due to her and this was her right in view of s. 219 of the Companies Act 1965. However, the abuse of the process arose when the petitioner's explanation in refusing to accept the said sum upon considering in its

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totality appeared to be not a *bona fide* petition and coupled with the fact that she has contradicted herself on the reasons for refusing to accept the payment. (para 8)

(4) The conduct of the petitioner subsequent to the filing of the petition was also a relevant fact to consider the fact in issue as to whether the petition was filed for a collateral purpose. Evidence of subsequent conduct is relevant under s. 8 of the Evidence Act 1950 in any proceedings and could be properly be taken into account. The demand made by the petitioner to settle the alleged debt of the supporting creditors reinforced the fact in issue that the petition was filed for a collateral purpose as it had a direct relation between the conduct and the fact in issue. (para 9)

(5) There was no reason advanced on behalf of the petitioner why she did not exhaust or take another adequate means or mode of action, among others, by a writ of seizure and sale to recover the said judgment sum of RM50,786.34. The court has discretion to refuse the order or to strike out the petition if it is found the creditor has acted improperly by filing a petition without attempting to obtain payment by other means. A petition for winding up a company is a serious matter as it affects the reputation of the company, in this case, a public listed company where the debt due to the petitioner was only RM50,786.34 and it could have been proceeded by way of writ of seizure and sale. (para 12)

(6) On the facts and circumstances of this case, the winding up petition if allowed to proceed would have been an abuse of the process of the court as it was filed for a collateral purpose, in particular, for the benefit of and to collect the alleged debt of the supporting creditors. (para 18)

Case(s) referred to:

Apirami Sdn Bhd v. Tamil Nesan (M) Sdn Bhd & Ors [1986] 1 CLJ 493; [1986] CLJ (Rep) 279 HC ***(refd)***

Australian Mid-Eastern Club Ltd v. Yassim 1 ACSR 400 ***(refd)***

Bank Industri & Teknologi Malaysia Bhd v. Alom Building Systems Sdn Bhd [2006] 3 CLJ 506 HC ***(refd)***

Blackman v. Fysh [1892] 3 Ch 209 ***(refd)***

Boey Oi Leng v. Trans Resources Corp Sdn Bhd [2002] 1 CLJ 405 ***(refd)***

Cetico Sdn Bhd v. The Tropical Veneer Co Bhd [1987] 1 CLJ 170; [1987] CLJ (Rep) 511 HC ***(refd)***

A *Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5 SC* ***(refd)***
Datuk Mohd Sari Datuk Nuar v. Idris Hydraulic (Malaysia) Berhad [1996] 3 CLJ 877 HC ***(refd)***
Four Pillars Enterprises Co Ltd v. Beiersdorf Aktiengesellschaft [1999] 1 SLR ***(refd)***
B *Hotel Royal Ltd Bhd v. Tina Travel & Agencies Sdn Bhd [1989] 1 LNS 170 HC* ***(refd)***
In re Belmont Land Company (No 2) [1913] SC Vol 32 1017 ***(refd)***
In re Bostels Ltd [1967] 1 Ch 346 ***(refd)***
In re Castle Coulson & MacDonald Ltd [1973] 1 Ch 382 ***(refd)***
C *In re Pavy's Patent Felted Fabric Company [1875-76] 24 WR* ***(refd)***
In re SBA Properties Ltd [1967] 1 WLR 799 ***(refd)***
In re The Norton Iron Company [1877-78] 26 WR ***(refd)***
In re Tweeds Garages Ltd [1962] 1 Ch 406 ***(refd)***
Lindeteves-Jacoberg (Malaya) Sdn Bhd v. Electrical Switchgears Automation (M) Sdn Bhd [1999] 6 MLJ 530 ***(refd)***
D *Malayan Plant (Pte) Ltd v. Moscow Narodny Bank Ltd [1980] 1 LNS 44 PC* ***(refd)***
Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd [1991] 1 CLJ 263; [1991] 1 CLJ (Rep) 343 SC ***(refd)***
Re Piccadilly Property Management Ltd [1999] 2 BCLC 145 ***(refd)***
E *Re St Thomas Dock' Company [1876] 2 Ch 116* ***(refd)***
Savant-Asia Sdn Bhd v. Sunway PMI-Pile Construction Sdn Bhd [2008] 6 CLJ 681 CA ***(refd)***
Si & Si Sdn Bhd v. Hazrabina Sdn Bhd [1996] 3 CLJ 657 FC ***(refd)***
Technomin Australia NL Kollack Group Ltd [1991] 9 ACIC 511 ***(refd)***
F *Teng Foh v. Liwu Realty Sdn Bhd [1989] 2 CLJ 275; [1989] 2 CLJ (Rep) 564* ***(refd)***
Teoh Vin Sen v. True Creation Sdn Bhd [2008] 4 CLJ 393 HC ***(refd)***

Legislation referred to:

Companies (Winding-Up) Rules 1972, rr. 28(1), 32
G Companies Act 1965, ss. 217, 218(1)(e), (2)(a), 219, 221(1), 223, 226(4)
Evidence Act 1950, s. 8

For the petitioner and 61 supporting creditors (encl. 18) - Kong Yit Har; M/s Siva, Ram & Kong
For the respondent - Fehri Azaat; (Syed Nasarudin Syed Al-Hadi with him);
H *M/s Radzi & Abdullah*
For the 101 supporting creditors (encl. 19) - Mura Raju; M/s Mura Raju & Co

Reported by Amutha Suppayah

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JUDGMENT

VT Singham J:

[1] This is an application by way of notice of motion dated 12 June 2009 (encl. 24A) by the respondent that the winding up petition dated 28 April 2008 (encl. 2) be struck out and the costs of this application be taxed and be paid forthwith by the petitioner and for any other or further relief as this court deems just and necessary.

[2] The grounds of this application as raised in the said notice of motion are as follows:

(i) The respondent has the ability to pay the sum stated in the winding up petition;

(ii) The respondent had on 23 April 2009 issued a cheque in the amount of RM50,786.34 to the petitioner but was returned;

(iii) The petition is frivolous and is an abuse of the process;

(iv) The petitioner has no basis whatsoever to rely on s. 218(1)(e) of the Companies Act; and

(v) The petitioner failed to establish how it is just and equitable for the court to order the respondent to be wound up.

The notice of motion is supported by an affidavit affirmed on 11 June 2009 (encl. 24A) by Tn. Haji Mokhtar bin Mohd Salleh on behalf of the respondent.

[3] The petitioner has opposed this notice of motion. The following affidavits have been filed by both parties in respect of this notice of motion:

(i) Affidavit in support of the notice of motion on behalf of the respondent (encl. 24A).

(ii) Affidavit in reply of the petitioner to the Notice of Intention to Oppose petition by the respondent and the said notice of motion (encl. 27).

(iii) Further affidavit in reply by Mdm. Kong Hit Har of M/s Siva Ram & Kong (encl. 28), the solicitors for the petitioner and for 61 supporting creditors.

A (iv) Affidavit in reply on behalf of the respondent (encl. 32).

(v) Further affidavit in reply on behalf of the petitioner (encl. 34) to the respondent's affidavit in reply (encl. 32).

B (vi) Affidavit in reply (2) on behalf of the respondent (encl. 36A).

(vii) Affidavit in reply (3) of the petitioner (encl. 37).

[4] As stated above, this is an application by the respondent to strike out the petition on the ground that it was an abuse of the C process of the court as the petition was filed for a collateral purpose. For the sake of clarity and convenience, it is relevant to state briefly the chronology of events and the background facts of this case which are as follows:

D (i) The petition to Wind Up the respondent company was filed on 28 April 2008 (encl. 2). This petition was filed by the petitioner as a judgment creditor pursuant to a judgment dated 10 January 2007 *vide* Summons No. 52-166-2002 at the Sessions Court, Kuantan. The judgment sum is for RM30,538 with the interest at the rate of 8% per annum E from 5 October 2001 till satisfaction and RM4,305 as costs. (see exh. P1 which is attached to the petition)

(ii) The petitioner's claim at the Sessions Court was for damages in respect of breach of the terms of a sale and purchase F agreement to construct a single storey bungalow house where the petitioner had claimed that there were defects in the construction of the said building.

(iii) The statutory notice dated 17 January 2008 under G s. 218(2)(a) of the Companies Act 1965 was issued to the respondent claiming a sum of RM51,204.03 which is made up as follows:

(a) Principal sum	RM	30,538
H (b) Interest thereon at 8% per annum		
From 5 October 2001 to 17 January 2008	RM16,361.03	

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(c) Costs	RM	4,305
Total	RM	51,204.03

(iv) As the respondent had failed or neglected to pay the said sum of RM51,204.03 within 21 days from the date of receipt of the said notice, the petition (encl. 2) was filed in court on 28 April 2008. (see s. 218(1)(e) of the Companies Act 1965).

(v) Affidavit of service of the petition on the respondent on 24 June 2008 was filed on 3 July 2008. (encl. 7)

(vi) Certificate of Compliance under r. 32 of the Winding Up Rules 1972 was filed on 5 September 2008 (encl. 17).

(vii) Notice of Intention to Appear on Petition with the list of 61 creditors was tendered in court on 24 April 2009 in support of the petition by M/s Siva Ram & Kong, solicitors for the said supporting creditors who are also the solicitors for the petitioner. (Enclosure 18). (see r. 28(1) of the Companies (Winding Up) Rules 1972)

(viii) Notice of Intention to Appear on Petition with the list of 101 creditors was tendered in court on 24 April 2009 by M/s Mura Raju & Co. in support of the petition wherein Mr. Mura Raju is also acting as counsel for the petitioner with Mdm. Kong Yit Har of M/s. Siva Ram & Kong. (Enclosure 19) (see r. 28(1) of the Companies (Winding Up) Rules 1972).

(ix) Affidavit in opposition on behalf of the respondent affirmed on 10 June 2009 was filed on 12 June 2009. (Enclosure 21)

(x) By letter dated 22 April 2009, the respondent's solicitors M/s Radzi & Abdullah had sent a cheque for the sum of RM50,786.34 to the petitioner's solicitors M/s Siva Ram & Kong in settlement of the judgment sum. (see exh. HM1 attached to the supporting affidavit of the respondent encl. 24A)

(xi) By letter dated 23 April 2009, the petitioner's solicitors M/s Siva Ram & Kong had returned the said cheque for the said sum of RM50,786.34 to the respondent's solicitors on the ground that "ia tidak mencukupi untuk membayar kesemua pemiutang-pemiutang", (the amount was insufficient to pay all the creditors) (see exh. HM2 of encl. 24A)

(xii) By letter dated 29 May 2009, the petitioner's solicitors M/s Siva Ram & Kong addressed to the respondent's solicitors M/s Radzi & Abdullah had requested payment from the respondent to settle the two sets of creditors amounting to a total sum of RM8,639,327.12 million. At this stage, it is important to disclose the contents of the said letter in *verbatim* which is as follows: (see exh. HM3 of encl. 24A)

Re: Kuantan High Court Winding Up No: 28-5-2008
Siti Esah binti Talib Petitioner
Mentiga Corporation Sdn. Bhd Respondent

We refer to the above matter where the hearing of the winding up petition on 24.4.2009 was adjourned to 22.6.2009 at your request on the ground that your client, the respondent, will settle the petitioner's claim and all the supporting creditors' claims. One set of supporting creditors (61 in all) are represented by us while the other set (101 all in) are represented by Messrs Mura Raju & Co.

The total of all these claims as at 22.6.2009 is RM8,639,327.12 made up as follows:

(i)	Total sum due to 61 judgment (supporting) creditors including the petitioner's claim, represented by us ...	RM3,347,412.40
(ii)	To sum due to 101 judgment (supporting) creditors represented by M/s Mura Raju & Co. ...	RM5,291,914.72
	Grand Total:	**RM 8,639,327.12**

Kindly ensure and arrange payment of the sums mentioned in (i) and (ii) above strictly in the form of bank drafts made payable as follows:

(a) RM3,347,412.40 in the name of Messrs Siva, Ram & Kong (Clients' Account), and

(b) RM5,291,914.72 in the name of Messrs Mura Raju & Co. (Clients' Account).

On or before 22.6.2009 whereupon we will withdraw the petition and have it struck off with costs/no order as to costs.

BUT if we do not receive the said sum as stated we shall proceed with the winding-up of the respondent.

We trust you will do the needful

Yours faithfully,

t.t

Siva, Ram & Kong

c.c Messrs Mura Raju & Co.
Advocate & Solicitors,
B-50, First Floor,
Lorong Air Putih 2,
Off Jalan Beserah,
25300 Kuantan
(Ref: MR/6753/nz)

(xiii) Notice of motion with the supporting affidavit was filed on 12 June 2009 by the respondent's solicitors. (Enclosure 24 and encl. 24A)

(xiv) Perakuan Segera dated 11 June 2009 by the respondent's solicitors to hear the notice of motion was filed on 12 June 2009. (Enclosure 23)

(xv) Notice by respondent of intention to oppose the petition dated 3 June 2009 was filed by the respondent's solicitors on 5 June 2009. (Enclosure 25)

(xvi) Hearing of the petition was fixed on 8 September 2008 at High Court 2 Kuantan and was adjourned to 27 February 2009.

(xvii) The hearing of the petition which came up for hearing on 27 February 2009 at High Court 1 was adjourned to 24 April 2009 at the request of the petitioner's counsel pending the decision on the application for stay by the respondent *vide* Appeal No: 12-82-2007 at High Court 2.

A (xviii) The hearing of the Winding Up Petition was adjourned to 24 April 2009 at the request of the respondent's solicitors as they wanted to settle the debt due to the petitioner. As the petitioner's counsel had agreed to the adjournment, the hearing of the petition was adjourned to 22 June 2009 B pending settlement.

(ix) On 22 June 2009, the hearing of the petition was adjourned to 28 July 2009 as the petitioner's solicitors intended to reply to the afidavit jawapan of the respondent which was served C only in the morning on 22 June 2009. (Enclosure 34)

(xx) In the meantime, on 28 July 2009, the respondent's application for stay was dismissed by the learned Judicial Commissioner of the High Court 2, Kuantan. The respondent had filed an appeal to the Court of Appeal D against the dismissal of the application for stay and the appeal is pending.

(xxi) On 28 July 2009, the notice of motion was adjourned to 15 October 2009 as the respondent's counsel who is from Kuala E Lumpur had left his bundle of authorities and the written submission in Kuala Lumpur.

(xxii) On 15 October 2009, in addition to the written submission having been filed, the parties had also made oral submission F in respect of the notice of motion (encl. 24) and the hearing was adjourned to 21 January 2010 pending further submission from the parties.

(xxiii) On 21 January 2010, notice of motion (encl. 24) was called up and adjourned to 23 February 2010 as further submission G was received by this court late and only on 19 January 2010.

(xxiv) On 23 February 2010, the case was not called as parties were informed that the decision for encl. 24 will be delivered on 25 February 2010 and subsequently the decision was H adjourned to 25 February 2010.

[5] Learned counsel for the respondent had referred to the following cases:

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i) *Teng Foh v. Liwu Realty Sdn Bhd* [1989] 2 CLJ 275; [1989] 2 CLJ (Rep) 564

ii) *Datuk Mohd Sari Datuk Nuar v. Idris Hydraulic (Malaysia) Berhad* [1996] 3 CLJ 877 HC

iii) *Apirami Sdn Bhd v. Tamil Nesan (M) Sdn Bhd & Ors* [1986] 1 CLJ 493; [1986] CLJ (Rep) 279

iv) *Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd* [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5

v) *Teoh Vin Sen v. True Creation Sdn Bhd* [2008] 4 CLJ 393

vi) *Lindeteves-Jacoberg (Malaya) Sdn Bhd v. Electrical Switchgears Automation (M) Sdn Bhd* [1999] 6 CLJ 109

vii) *Bank Industri & Teknologi Malaysia Bhd v. Alom Building Systems Sdn Bhd* [2006] 3 CLJ 506

[6] On the other hand, learned counsel for the petitioner together with the solicitors for the supporting creditors have referred to the following cases:

i) *In re SBA Properties Ltd.* [1967] 1 WLR 799

ii) *Four Pillars Enterprises Co. Ltd v. Beiersdorf Aktiengesellschaft* [1999] 1 SLR

iii) *Re Piccadilly Property Management Ltd.* [1999] 2 BCLC 145

iv) *In re Belmont Land Company (No 2)* [1913] SC Vol 32 1017

v) *Australian Mid-Eastern Club Ltd v. Yassim* 1 ACSR 400

vi) *In re Pavy's Patent Felted Fabric Company* [1875-76] 24 WR

vii) *In re The Norton Iron Company* [1877-78] 26 WR

viii) *Malayan Plant (Pte) Ltd v. Moscow Narodny Bank Ltd* [1980] 1 LNS 44

ix) *In re Bostels Ltd.* [1967] 1 Ch 346

x) *In re Castle Coulson & MacDonald Ltd.* [1973] 1 Ch. 382

xi) *Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd* [1991] 1 CLJ 263; [1991] 1 CLJ (Rep) 343

A xii) *Cetico Sdn Bhd v. The Tropical Veneer Co. Bhd.* [1987] 1 CLJ 170; [1987] CLJ (Rep) 511

xiii) *In re Tweeds Garages Ltd* [1962] 1 Ch 406

B ix) *Hotel Royal Ltd Bhd v. Time Travel & Agencies Sdn Bhd* [1989] 1 LNS 170

xv) s. 223 & s. 226(4) of the Companies Act 1965

Decision

C **[7]** On going through the notice of motion (encl. 24), the supporting affidavit (encl. 24) and all the affidavits filed by both parties in respect of encl. 24, and the submission with the authorities and upon further research carried out by this court, the decision of this court is:

D **[8]** The main issue for this court to decide at this stage of the hearing of this notice of motion (encl. 24), in particular, grounds (ii) and (iii) which are to be read together is, whether the petition (encl. 2) was filed for the sole purpose and object of recovering the E judgment sum obtained by the petitioner or for any collateral purpose and to exert pressure on the respondent to settle the claims of other creditors as contained in the two list of supporting creditors. Consequently, whether there is any abuse of the process of the court. At this stage, it is not appropriate for this court to F consider whether the respondent/company is solvent or not and that it is just and equittable to wind up the respondent-company as that is a matter which should be left to be decided at the hearing of the petition. (see s. 218(1)(e) of the Companies Act 1965)

G (1) It is to be noted that the petition (encl. 2) was filed pursuant to a judgment sum, being RM50,786.34 obtained on 10 January 2007 by the petitioner as a judgment creditor against the respondent.

H (2) At the time when the statutory notice dated 17 January 2008 was issued to the respondent, the sum then due was RM51,204.03. However, the respondent had failed or neglected to settle the said sum within the said period of 21 days. Consequently, the petition was filed against the respondent on the ground that they are deemed to be unable to settle the I judgment sum as claimed by the said Notice of demand.

(3) However, by a letter dated 22 April 2009, the respondent's solicitors had sent the sum of RM50,786.34 to the petitioner's solicitors in full settlement of the debt but the payment was rejected. The cheque was returned by the petitioner's solicitors by letter dated 23 April 2009 on the ground that "ia tidak mencukupi untuk membayar kesemua pemiutang-pemiutang." A B

(4) This court is of the considered view that there is no impediment to settle the judgment sum or debt even after the time stipulated in the statutory notice to the respondent had passed or even after the petition is filed in court as this will depend on the facts and circumstances of the particular case and is on a case to case basis. C

(5) The grounds as stated in the letter dated 29 May 2009 (exh. HM3 of encl. 24A) by the petitioner's solicitors for refusing to accept the payment has cast doubt on the *bona fide* of the petitioner since the petition which was filed ought to have been for the sole purpose of recovering the judgment sum obtained by the petitioner and not to collect the alleged debts of the supporting creditors. D E

> "The object of a creditors petition to wind up is to get paid; a creditors petition ought to be presented with no other object," (per Jessel, MR in re St. Thomas' Dock Company [1876] 2 Ch. 116 at p. 118)

(6) It is not denied from the authorities that the petitioner has the option, whether or not to accept the payment in settlement of the debt due to her and this is her right in view of s. 219 of the Companies Act 1965. (see *Savant-Asia Sdn. Bhd. v. Sunway PMI-Pile Construction Sdn. Bhd.* [2008] 6 CLJ 681). However, the abuse of the process arises when the petitioner's explanation in refusing to accept the said sum upon considering in its totality appears to be not a *bona fide* petition and coupled with the fact that she has contradicted herself on the reasons for refusing to accept the payment. F G H

(7) The basis of the petition appears to be that the respondent is unable to settle the judgment debt being RM50,204.03 due to the petitioner as at 17 January 2008. However, the payment when tendered was rejected on the ground that the amount was insufficient to pay all the creditors. However, the grounds raised I

A in the affidavit in reply of the petitioner (encl. 27) for refusing to accept the payment conflicts with the ground as raised in the letter dated 29 May 2009 (exh. HM3). By para 5(iii) (b) and (c) of the affidavit in reply (encl. 27), the petitioner has advanced entirely a different set of reasons for having rejected B the payment, ie, first, the amount of RM50,786.34 was not the full sum of her claim as the sum due on the date of hearing the petition on 24 April 2009 was RM53,289.62 and secondly, the petitioner's solicitors felt "that accepting such payment from the respondent would amount to undue preference to the C prejudice of the other 61 supporting creditors." The grounds as raised by the affidavit in reply which was affirmed on 15 June 2009 (encl. 27), is obviously an afterthought and is in conflict with the original reason for refusing to accept the payment as contained in the letters dated 23 April 2009 and 29 May 2009. D (Exhibit HM2 and HM3).

[9] This court is of the considered view that the date of filing the petition need not necessarily be the determining factor as to whether the petition was filed for a collateral purpose and to exert pressure E on the respondent to settle the alleged debts of the supporting creditors. The conduct of any party, in the instant case, the petitioner, subsequent to the filing of the petition is also a relevant fact to consider the fact in issue as to whether the petition was filed for collateral purpose, (see s. 8 of the Evidence Act 1950). Evidence F of subsequent conduct is relevant under s. 8 of the Evidence Act 1950 in any proceedings and may properly be taken into account, in the instant case, the demand made by the petitioner to settle the alleged debt of the supporting creditors amounting RM8,639,327.12 million to reinforce the fact in issue that the G petition was filed for a collateral purpose as it has a direct relation between the conduct and the fact in issue. At this stage, it is important to be reminded that the judgment debt due to the petitioner at the time when the statutory notice was issued under s. 217 of the Companies Act 1965 was only RM51,204.03 as on H 17 January 2008.

[10] The legal battle in this notice of motion is between the petitioner and the respondent and it is not between the individual creditors who intend to appear on the petition and to support the petition which may be a relevant factor for consideration at the I hearing of the petition and not at this stage of the hearing of the

notice of motion to strike out the petition. (see s. 221(1) of the Companies Act 1965). Therefore, the supporting creditors ought not to be allowed to participate in this hearing of the notice of motion as the issue of whether the order of winding up ought to be made or the respondent is unable to pay their debts did not arise as yet for consideration of this court and it is not a decisive consideration in so far as this notice of motion. The supporting creditors rightfully have no locus at this stage of the hearing of the notice of motion to strike out the petition which is based on the ground that it is filed for a collateral purpose by the petitioner and not *bona fide* and this issue is a matter entirely personal to the respondent and is against the petitioner. However, learned counsel of the supporting creditors of the second list (encl. 19) was allowed to submit to assist the court to arrive at a just decision.

[11] This court is in agreement with the contention of learned counsel for the respondent that what is being tested in a striking out application is not the solvency of the respondent but the *bona fide* of the petitioner's winding up petition and whether it is for a collateral purpose. This issue is personal against the petitioner.

> ... A Petition which is launched not with the genuine object of obtaining the relief claimed, but with the object of exerting pressure in order to achieve a collateral purpose is, in my judgment, an abuse of the process of the Court, and it is primarily on that ground that I would dismiss this action. (per Plowman J in *Re Bellador Silk Ltd* [1965] 1 All ER 667)

[12] This court finds there is no reason advanced on behalf of the petitioner why she did not exhaust or take another adequate means or mode of action, among others, by a writ of seizure and sale to recover the said judgment sum of RM50,786.34. In addition, there are also other alternative means and more appropriate modes of recovering the judgment debt due to her by the respondent. The list of processes of execution is not closed as execution is any process of the court designed to enforce a judgment. It must be, in the instant case be only for the purpose of enforcing the judgment debt obtained by the petitioner against the respondent. (see *Blackman v. Fysh* [1892] 3 Ch. 209 at p. 217). A creditor is entitled pursuant to the Companies Act 1965, to present a petition for winding up a company for non-payment of a judgment debt. Consequently and *prima facie*, an unpaid creditor has a right to obtain a winding up order against a company which fails to pay its *bona fide* debt.

A However, the court has discretion to refuse the order or to strike out the petition if it is found the creditor has acted improperly by filing a petition without attempting to obtain payment by other means, (*re St. Thomas Dock' Company* [1876] 2 Ch. 116 at p. 118-119).

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[13] A petition for winding up a company is a serious matter as it affects the reputation of the company, in this case, a public listed company where the debt due to the petitioner is only RM50,786.34 and it could have been proceeded by way of writ of seizure and sale. C The abuse of the process is clearly shown in the conduct of the petitioner where she had exerted pressure on the respondent to settle not just the judgment debt due to her but the alleged claims of all other supporting creditors as well.

D In *Ng Ah Kway v. Tai Enterprise Sdn Bhd* [1986] 1 MLJ 58 said at p. 64: Shankar J (as he then was) said at p. 64 that:

> Great damage may obviously be done to solvent company by a winding-up petition presented by an unreasonable creditor, whose debt the company are able and willing to pay if established.
>
> E A company that has proven itself to be commercially solvent, has the right to protect itself from being disturbed by a creditors' petition to wind it up. And if it can be determined that the petition is (to use the test in *Bryanstone Finance, supra*) bound to fail, an injunction will lie. And to this may be added a rider. A creditor F choosing to enforce his right to a debt by petitioning for the winding up a company must act *bona fide* in pursuant of such a right. A failure to do so is an abuse of the process of the court. A judgment creditor will not be acting *bona fide* if a direct alternative means of recovering his debt by a writ of seizure and sale under O. 45 r. 1(a) is available to him and he chooses not to pursue it. G Provided there is a valid reason why that alternative means is not resorted to, it would be perfectly legitimate for the court to adopt the Bentham utilitarian approach to injunct the creditor from presenting the petition in order to prevent the company from suffering more harm than necessary.
>
> H The winding up order is without doubt a drastic remedy, a sledge hammer remedy. (per Wan Sulaiman FJ in *Tahansan Sdn. Bhd. v. Tay Bok Choon* [1985] MLJ 58)
>
> For a holding company which is publicly listed it can be assumed I that the issue and pendency of winding up proceedings are damaging to its credit and reputation: (*Re Kolback Group Ltd* (Bryson J) 4 ACSR 165 p. 173).

> Although it took more than a year since the petition for winding up was filed to hear the petition, some laws of judicial time would not be too high of price to pay in order to maintain confidence in the administration of justice in this jurisdiction. (per Gunn Chit Tuan J (as he then was) in *David Anthony v. PP* [1985] 1 MLJ 453 at p. 456)

[14] On the totality of the material in evidence, the inference that can be drawn is that, the petitioner has a collateral purpose where she had in fact exerted pressure on the respondent to settle the alleged debts of other parties, namely, the two set of supporting creditors. Accordingly, the interest and object of the petitioner to recover her judgment debt by this petition for winding up did not seem to be the primary purpose of filing and proceeding with the hearing of the petition. The general rule of equity is that the petitioner's primary purpose of filing the petition for winding up should have been to recover the judgment debt due to the petitioner and a petitioner would not be allowed to proceed with the hearing of the petition where the primary purpose appears to be clouded with the interests of other creditors who have claimed for their alleged debt through the petitioner.

> Megarry J in the case of *Re Lympne Investments Ltd* [1972] 2 All ER 385 at p. 389 said:
>
> The Companies Court must not be used as a debt-collecting agency, nor as a means of bringing improper pressure to bear on a company. The effects on a company of the presentation of a winding up petition against it are such that it would be wrong to allow the machinery designed for such petitions to be used as a means of resolving dispute …
>
> In *Re St. Thomas' Dock Co.* [1876] 2 Ch. D 116 Jessel MR said at p. 118:
>
> The object of a creditors' petition to wind up is to get paid; a creditors' petition ought to be presented with no other object.

[15] The presentation of the petition and the eagerness to proceed with the hearing of the petition is much to be desired and appears to be a calculated move to harass and embarrass the respondent, to exert pressure on the respondent to such an extent that the respondent is put under pressure to submit to the demand of the supporting creditors through the petitioner or to meet the threat or

A risk of being wound up. The sequent of events, the conduct of the petitioner and the filing of the various documents by the petitioner's solicitors who are also representing the 60 other creditors in support of the petition is so inter-linked that they are inseparable. Accordingly, the cumulative effect of filing the petition
B and to proceed with the hearing could not have been for the sole and genuine purpose of recovering the judgment debt due to the petitioner or to protect her interest but is more of a debt collecting exercise.

C > An endeavour to obtain an improper advantage is in my view the stark, simple and only characterisation which could be given to the whole proceedings. (per Bryson J in *Re Kolback Group Ltd* 4 ACSR 165 p. 175).

[16] As stated above, the petitioner has other mode or alternative
D means of recovering the judgment debt which later was increased to RM51,204.03 at the time when the statutory notice of demand was issued but instead, the petitioner chose to file this winding up petition, which is a drastic step to recover a sum of RM51,204.03 from a public listed company where the consequences upon a
E winding up order may result in disaster and has detrimental effect on the respondent. On the set of facts and in the light of what this court has said earlier in this judgment, this court finds that the primary purpose of filing and proceeding with the hearing of the petition appears to be clouded with conflict of interest and cannot
F be for the sole purpose of protecting the interest of the petitioner or to recover the judgment debt due to the petitioner. There must be fairness, equitable and conscionable conduct on the part of the petitioner which this court finds is lacking.

G > A petition for the winding up of a company is a grave matter for the company and those who have dealings with the company. There are important consequences that affect a variety of matters as stipulated in s. 219(2) of the Companies Act 1965. The cumulative effect and the consequences that a company, upon a petition for winding up presented against it, cannot carry on business as outsiders
H > will be reluctant to have dealings with it. (per Sinnathuray J in *Re Pentasia (Pte) Ltd.* [1979] 2 MLJ 59 at p. 60)

[17] On the set of facts and the circumstances of this case, the reasonable inference that can be drawn is that, the petition was filed
I not for the sole purpose or object of recovering the judgment debt due to the petitioner. The subsequent conduct of the petitioner has

revealed that it was filed for a collateral purpose and this came to light upon considering the facts on its totality. Consequently, as contended by learned counsel for the respondent, this court is in agreement that it is an abuse of the process of the court to allow the petitioner to proceed with the winding up petition.

> An application made for some improper purpose, is well established and equips the court to deal with opportunities for abuse of process which take special forms in relation to winding up applications because of the impact that the mere commencement and also advertisement and pendency of such proceedings can have on a company and its affairs. (*Re Kolback Group Ltd* (Bryson J) 4 ACSR 165 p. 173).
>
> The pendency of such an application is disruptive of the affairs not only of the company but also of other persons, including persons dealing with it and wishing to deal with it. Its pendency is a considerable disadvantage to the company in carrying on business. Many persons are affected in the present case as the company is publicly listed. (*In Re Kolback Group Ltd* 4 ACSR 165 at 175).

[18] On the facts and circumstances of this case, this court is satisfied that the winding up petition if allowed to proceed would be an abuse of the process of the court as it was filed for a collateral purpose, in particular, for the benefit of and to collect the alleged debt of the supporting creditors. It has been shown that the petitioner has exerted pressure on the respondent to pay not only the judgment debt obtained in her favour but to settle or meet the alleged debt of all other supporting creditors. This court will not make any express finding of any conspiracy between the petitioner and the supporting creditors as contended on behalf of the respondent as the facts when considering in its proper and judicial perspective speaks for itself.

> In *Re A Company (1)* [1915] (1) Ch. 520, Phillimore LJ said at p. 528:
>
> She is not therefore seeking to enforce her judgment. She is proceeding to a new alternative mode of recovering her debt, a mode by which she no longer seeks to recover for herself alone but for the benefit of all the creditors.
>
> As Jessel MR said in *re St Thomas Dock Co* [1876] 2 Ch D 116:
>
> The petition may be and probably is, presented with the idea of getting paid, not of getting paid under the winding up, but of getting paid by reason of the company not daring to meet the threat or risk of being wound up, which is I will not say an illegitimate use, but

A not the primary use of a petition for winding up of a company.

Abuse of process as a ground upon which presentation or continuance of winding up proceedings may be restrained has had recurring attention and some characteristic forms of abuse of process are well established and clearly recognized. (*Re Kolback* B *Group Ltd* (Bryson J) 4 ACSR 165 p. 173)

In *L & D Audio Acoustics Pty Ltd v. Pioneer Electronic Australia Pty Ltd* [1982] 7 ACLR 180 at 183, McLelland J said:

Proceedings by a person as creditor for the winding up of company C on the ground that it is unable to pay its debts will ordinarily be held to be an abuse of process:

1) if the application is made for some improper purpose eg, if the applicant is seeking to use the winding up proceedings to D coerce into paying a debt without giving the company a reasonable opportunity to ascertain or have it established that the debt is properly payable.

[19] The facts in respect of the cases referred to on behalf of the petitioner can be distinguished on the set of facts, background and E the circumstances in the instant case and it is limited to its own sets of facts as distinguished and submitted by learned counsel for the respondent and does not assist the petitioner to enable this court to dismiss this notice of motion but for the principles of law. In any event, one thing must be made clear that the petitioner F cannot use the winding up proceedings to compel the respondent to settle the alleged claims of the supporting creditors as contained in encl. 18 and encl. 19 as that method of enforcing the judgment debt due to the petitioner would be an abuse of the process of the court. In fact, a petition filed for an improper purpose was dismissed G as an abuse of process, (see *Technomin Australia NL Kollack Group Ltd* [1991] 9 ACIC 511)

[20] In the circumstances and in accordance with the rules of reasons and justice, this court finds that on the set of facts and H circumstances as stated above, this court ought to, and is an appropriate case for this court, in the exercise of its discretion to strike out the petition as prayed for in the notice of motion (encl. 24). (see *Boey Oi Leng v. Trans Resources Corporation Sdn Bhd* [2002] 1 CLJ 405; *Si & Si Sdn Bhd v. Hazrabina Sdn Bhd* [1996] 3 CLJ

I

657).

[21] Accordingly, prayer (a) of the notice of motion is allowed, ie; the winding up petition dated 28 April 2008 (encl. 2) is struck out and prayer (b), the costs of this application is allowed and to be paid by the petitioner. Costs is to be taxed, if there is no agreement.